

P R O C E E D I N G S

THE DEPUTY CLERK: Smith v. SunPath, Ltd.,
Case 1:22-cv-81.

Counsel, please note your appearances for the
record.

THE COURT: We'll start with the plaintiff.

MR. PELUSO: Good morning, Your Honor.
Patrick Peluso appearing on behalf of the plaintiff.

THE COURT: Good morning, Mr. Peluso. How are
you?

MR. PELUSO: I'm all right. How are you?

THE COURT: Good. Thank you.

MR. CAFFAS: Good morning, Your Honor. Gregory
Caffas here on behalf of the defendant, SunPath, Limited.

THE COURT: And good afternoon, Mr. Caffas. How
are you?

MR. CAFFAS: Good morning, Your Honor.

THE COURT: All right. So I understand -- so
let's just sort of plow through this one issue at a time.
But I understand that there was a supplemental discovery
production that occurred after the original motion was
filed.

So I just want to -- the first thing I want to do
is make sure that I understand exactly what currently is in
dispute, what the parties' positions are, to make sure I

1 haven't missed anything along the way, and then we'll rule,
2 and we'll at least give you guys some clarity as to what the
3 lay of the land is going forward.

4 It may make sense -- and this is the defendant's
5 motion to compel. So if you would like to do it in a
6 different way, that's fine. It may make sense to start
7 with, I think what you've referred to as the contention
8 discovery requests, and let's resolve those first.

9 Does that make sense?

10 MR. CAFFAS: Yes, Your Honor.

11 THE COURT: Okay. So, first let's -- I want to
12 make sure we're clear, exactly which requests are you
13 referring to within that bucket?

14 MR. CAFFAS: To clarify, Your Honor, since we're
15 discussing this in the context of the
16 supplemental interrogatories -- or, sorry, the supplemental
17 responses that plaintiff has submitted, are you asking me
18 about what the -- what effect those have had on the
19 discovery requests?

20 THE COURT: Yes. What's currently in dispute.
21 I'm assuming that the supplemental responses either change
22 something, change everything or change nothing; so ...

23 MR. CAFFAS: The latter, Your Honor. I would
24 argue that they change nothing. They don't cure anything
25 noted in our initial motion. And, if anything, especially

1 with regards to responses to -- the supplemental responses
2 to Interrogatory 1, 2 and 3, I would argue that they raise
3 additional questions that appear to need to be supplemented.
4 It looks like plaintiff had rushed to put something together
5 in order to try and resolve this motion --

6 THE COURT: All right. Listen to this --

7 MR. CAFFAS: -- and hasn't done that.

8 THE COURT: -- it's your motion. Why don't you
9 start with whatever individual or group of discovery
10 requests that you want to. I'll hear -- just make sure I
11 understand which specific request you're referring to. You
12 don't have to repeat what's in your brief, but just
13 summarize your position for the record. I'll hear from
14 plaintiff, and then, you know, we'll tackle them one at a
15 time; okay?

16 MR. CAFFAS: Yes, Your Honor.

17 I think the first thing to address is the
18 boilerplate objection that plaintiff has raised as to a --
19 that's comes into play in this motion. It's
20 Interrogatories 1, 2, 3, 4, 8, 9, 18, 22, 23. And then
21 Document Requests 15, 16, 17, 19, 20, 22, 23, 28, 29, 32 and
22 33, which are all listed, it's on page 7 of our initial
23 motion to compel.

24 And the issue that we take with this objection,
25 Your Honor, is that it's the definition of a boilerplate

1 objection in that it just states that these requests are
2 premature without stating any basis as to why that affects
3 their ability to give any kind of answer or what that, in
4 turn, is causing plaintiff to need more time to submit
5 responses, either when they were initially propounded back
6 in September or currently as it stands three weeks from the
7 end of discovery.

8 THE COURT: So let's start there. That's a fine
9 place to start.

10 So, Counsel, with respect to the objection that,
11 at this point, responses are premature. Right. My general
12 view is, you're a couple weeks out from your discovery
13 cutoff. Right. It's hard to have things be too premature
14 at this point. You have a hard discovery cutoff sometime in
15 early or mid-December.

16 I understand that there could be, and there may
17 well be, supplemental productions there are necessary after
18 depositions are taken or after additional information is
19 acquired, but we don't really have a lot of time here. And
20 so to the extent that you're -- that, you know, that's what
21 you're resting on, solely the issue that a response now is
22 premature, I'm not inclined to grant that. I am inclined to
23 have the plaintiff respond to the discovery request based on
24 the information you have today. If those responses are
25 going to change as a result of a deposition or new

1 information that is properly discoverable, then I'm going to
2 ask you to supplement your response as needed. But we do
3 need to get moving, and we do need to kind of push this
4 matter forward from a discovery perspective.

5 If you have other objections that are not
6 boilerplate ones, that are specifically tailored to the
7 request, to the nature of the discovery, to the relevance,
8 proportionality, whatever, I'm happy to hear those
9 objections, and I'm happy to hear any argument you have as
10 to why that's not a proper, you know, game plan going
11 forward.

12 But my initial impression is -- unless you can
13 convince me otherwise -- if you're not objecting to the
14 substance of the discovery request, you're only objecting
15 that they're -- that really, it's not -- it's premature to
16 respond, I'm not inclined to grant your -- or stay your
17 objection on those grounds, but I'm happy to hear you on
18 that point.

19 MR. PELUSO: Understood, Your Honor.

20 You know, it's -- regardless of the merits of the
21 objection that is premature, I understand Your Honor is not
22 inclined to find that objection meritorious. We're not
23 withholding documents or information based on that
24 objection. So all the information --

25 THE COURT: Then why did you make it?

1 MR. PELUSO: Understood, Your Honor. It's mostly
2 just to note that there's information that we're still
3 trying to track down through the discovery process and that
4 we will then turn around and supplement, to the extent that
5 we acquire additional information.

6 THE COURT: It sounds like everybody's on the same
7 page there.

8 MR. PELUSO: This is what I was --

9 MR. CAFFAS: If I could object, Your Honor.

10 THE COURT: No. Let him finish.

11 MR. PELUSO: It's sort of what I was explaining
12 before today's hearing. That even if Your Honor granted his
13 motion, I don't have additional information to give him.

14 THE COURT: Okay.

15 MR. PELUSO: So it's sort of an academic exercise
16 about whether the -- it's a premature objection.

17 THE COURT: So the purpose of today is to resolve
18 disputes. Right. And, you know, in the discovery process,
19 there are often good-faith, honest disputes, or issues over
20 which reasonable minds can differ. Right. But what I need
21 to do today is find out what those really kind of -- focus
22 in on what those disputes are, and what the respective
23 arguments of the parties are, and I'm going to give you, by
24 the time we leave today, total clarity on what everybody --
25 what's expected of those parties.

1 So if -- with respect to the interrogatories that
2 defense counsel just enumerated, based on the premature
3 objection, it sounds like we're all on the same page that
4 you're going to provide the discovery requested, with the
5 understanding that you'll supplement those discovery
6 responses as necessary in a reasonably timely fashion as you
7 get new information.

8 MR. PELUSO: That's correct, Your Honor.

9 THE COURT: And if there is a specific -- or let
10 me ask defense counsel.

11 Is there a specific document, or is there a
12 specific issue that you think that you're entitled to that's
13 responsive to the discovery that they have that they have
14 not provided?

15 MR. CAFFAS: First of all, yes. There is --
16 specifically with respect to some of the information that
17 was raised in their supplemental response to --

18 THE COURT: Okay. You're going to have to be
19 specific.

20 MR. CAFFAS: Right.

21 THE COURT: Right. We need -- I can't make
22 general rulings. Right. I need specific issues to decide.

23 So what specifically, right now, do you think they
24 have that's responsive to a discovery request that they have
25 not provided that you're seeking an order to compel them to

1 do so?

2 MR. CAFFAS: Your Honor, that would go to the
3 basis of the contentions contained in Interrogatories 1, 2
4 and 3 at the very least.

5 As it applies to Interrogatory 1, which is listing
6 the cause for which Ms. Smith is seeking damages for in this
7 case, these were provided for the first time on
8 November 11th for a case that's been ongoing since this
9 summer.

10 THE COURT: Okay. We're not worried about that.

11 MR. CAFFAS: Right.

12 THE COURT: I want to know if, from what I
13 understand -- let's take Interrogatory 1 as an example.

14 MR. CAFFAS: Uh-huh.

15 THE COURT: "Identify all calls to your cellular
16 telephone numbers for which you seek recovery in this
17 lawsuit that you allege were made by or on behalf of
18 SunPath, and state all factual bases for your contention
19 that each call was made by or on behalf of SunPath."

20 MR. CAFFAS: Uh-huh.

21 THE COURT: Right?

22 MR. CAFFAS: Yes.

23 THE COURT: Plaintiff, you're not -- or plaintiff,
24 as I understand it, is not objecting to the substance of
25 that interrogatory. They are telling you that they have

1 complied to the best they can, that they have provided all
2 information in their possession with respect to that
3 interrogatory.

4 MR. CAFFAS: And, Your Honor, our position is that
5 based on the content of this supplemental response, that is
6 not true as of -- as it stands.

7 Specifically, there's calls listed for June 1st
8 and June 8th where they are listing, for the first time,
9 that apparently there were voice mails that are associated
10 with those calls that they have been able to identify and
11 haven't gotten that information from any third party in this
12 case, that we're aware of, that they haven't provided. That
13 would be a fact that supports their contention.

14 THE COURT: They are stuck with their answer.
15 Right. It sounds to me what you're doing is you're kind
16 of -- you know, you're kind of creeping this into a
17 potential summary judgment motion. Right.

18 If that's their answer; that's their answer. If
19 their answer is insufficient, if their answer doesn't, you
20 know -- if their answer essentially, as I understand what
21 you're saying, as limited as it may be, maybe that helps
22 your summary judgment argument.

23 MR. CAFFAS: Uh-huh.

24 THE COURT: Right. But they're not going to be
25 able, in a summary judgment motion or at trial or anything

1 else, to now supplement the discovery.

2 If what they've alerted to you is, here is a full
3 representation, this is a full representation of all the
4 facts and information in our possession responsive to
5 Interrogatory Number 1, and you think it's insufficient,
6 well, they're stuck with it; right? I mean, it sounds like
7 you want them to do further investigation. And if it's that
8 insufficient, then plaintiff isn't going to be able to carry
9 their burden.

10 MR. CAFFAS: Well, Your Honor, it leads -- that
11 leads me to my second point with, again, going towards the
12 consent of the supplemental response to Interrogatory 1, is
13 that there's other contentions that aren't supported by any
14 of the facts in any of their responses.

15 THE COURT: But let's be specific. Let's stick
16 with Number 1.

17 MR. CAFFAS: Uh-huh.

18 THE COURT: What do you contend they have in
19 response to your interrogatory that they have not turned --
20 that's in their possession that they have not turned over to
21 you?

22 MR. CAFFAS: Well, at the very least, Your Honor,
23 there would be call notes and call records that seem to be
24 able to allow Ms. Smith to --

25 THE COURT: All right. Stop right there.

1 Do you have any call notes or call records that's
2 responsive to Interrogatory Number 1?

3 MR. PELUSO: Your Honor, the only call notes are,
4 truthfully, work product. It would be our own
5 internal-created Excel spreadsheet of what the client told
6 us over the phone about the calls. So that is
7 attorney-created attorney work product.

8 Our -- my understanding is that my client is able
9 to access call records from AT&T for a price of \$5 per
10 month, which we have instructed her, within the last week,
11 to go and do, and when we have that information, we will
12 turn it over. We are not trying to withhold any information
13 whatsoever from SunPath. We understand our discovery
14 obligations.

15 Just as a matter of how I practice, I, frankly,
16 hate getting into discovery disputes.

17 THE COURT: Well, we're here.

18 MR. PELUSO: I understand -- I understand that
19 they have defenses and they are entitled to information --

20 THE COURT: Hold on. Don't shake your head.
21 Everybody's a lawyer. Everybody's doing the best they can.
22 Right. There are absolutely -- and I say this because if
23 that happens on the fifth, sixth, seventh -- or we're on the
24 fifth. But if that happens on the sixth through tenth
25 floor, the person in this seat will explode.

1 MR. CAFFAS: Understood, Your Honor.

2 THE COURT: Okay. Please remain stoic, make your
3 argument as best you can, advocate for your client as best
4 you can. I promise you both, we're going to figure this
5 out. Right.

6 MR. CAFFAS: Understood.

7 THE COURT: When it comes to the discovery
8 process, everybody is ultimately going to get what they're
9 entitled to. Right. It just -- sometimes it happens
10 sooner; sometimes it happens later, but everybody's going to
11 get what they're entitled to. I promise.

12 MR. CAFFAS: Understood.

13 THE COURT: Okay. So let's just work through
14 this.

15 MR. PELUSO: So --

16 THE COURT: Take it one step at a time.

17 MR. PELUSO: So, really, the only thing that -- I
18 can see three sort of categories of documents that we would
19 even have that -- or have access to that have not been
20 turned over. One is simply an Excel spreadsheet that we, as
21 the attorneys, created to log what our client told us.

22 THE COURT: All right. So let's stop right there.

23 Do you have any argument as to why that
24 spreadsheet would be otherwise discoverable and why it
25 wouldn't be work-product privilege?

1 MR. CAFFAS: The spreadsheet, Your Honor, no;
2 however, what I would say is Mr. Peluso has referred to
3 information that Ms. Smith was providing over the phone.
4 That would indicate that she's not -- these were calls that
5 occurred in 2020.

6 THE COURT: Have you deposed Ms. Smith yet?

7 MR. CAFFAS: No, Your Honor. We're in -- we've
8 filed this motion so that we won't have to depose her
9 multiple times so that her deposition will be productive and
10 we won't have to --

11 THE COURT: Well, I've got to tell you, my sense
12 as to what Ms. Smith tells her counsel is privileged. And
13 counsel is not required, in any way, shape or form, to
14 disclose what Ms. Smith tells to counsel. That's why you
15 get to depose the plaintiff. Right. If counsel takes
16 notes, prepares internal documents, spreadsheets, whatever,
17 based on information provided by their client, that clearly
18 is going to be work product.

19 So, with respect to that first bucket that
20 counsel's referred to, I don't see that that's properly
21 discoverable here. If you need to, you know -- you know, to
22 the extent that they -- that they have that information,
23 that she has records or documents, that's fine. Right. And
24 that's properly discoverable.

25 But if you have to depose her multiple times, then

1 we'll deal with it multiple times. But I don't think that
2 you get her statements to her lawyer in order to prep for
3 your deposition of her.

4 MR. CAFFAS: Understood, Your Honor. We're not
5 asking for her statements to her attorney; we're -- we've
6 asked for, for example, her notes, calendars, internal --
7 her records that allowed her to track this in order to go to
8 her attorney to file a claim. Those have been requested.

9 THE COURT: That's fine. And are there such
10 records or documents, and, if not -- if so, have they been
11 provided?

12 MR. PELUSO: I'm not aware of any such document.

13 THE COURT: And understand that when they make
14 that representation -- you know, it is a requirement that
15 when lawyers respond to a discovery request, that they make
16 a certification, right, that they've taken all reasonable
17 steps to investigate or to look wherever this information
18 could possibly be, and if that's what happens, that's what
19 happens. So, if there are no records or documents, they're
20 stuck with that. And if there's an 11th hour dump, right,
21 then there's going to have to be further inquiry.

22 But, at this point -- and, again, this isn't a new
23 case. Right. This case is -- you know, you're three weeks
24 away from shutting down discovery as far as -- maybe less
25 than that, right, sometime early to mid-December. You know,

1 you're really -- you know, you may not be at the 11th hour,
2 but you're pretty close to it.

3 So if there are -- you know, if there are those
4 records or documents and they seem properly discoverable, if
5 you're representing today on the record, in court, as an
6 officer of the Court that they don't exist, that you've made
7 reasonable efforts to obtain them and they don't exist, then
8 we're going to take that representation and move on, and
9 they're stuck with it. You know, they're not going to be
10 able to come back, you know, whether for summary judgment,
11 whether for a trial or whatever and say, well, look, we have
12 these other 54 exhibits that corroborate what plaintiff is
13 testifying to. That's not going to happen.

14 MR. PELUSO: Understood, Your Honor. And the only
15 documents that I can even --

16 THE COURT: So, I'm sorry. I don't remember what
17 you said before. You said there were three buckets of
18 documents you were talking about.

19 You've dealt with the first bucket. What are the
20 other two?

21 MR. PELUSO: So the second bucket would be her
22 cell phone call records. Right. And we all have cell
23 phones. Our cell phone company sends you a monthly
24 statement evidencing the calls that you've received or that
25 you made. She doesn't have those statements anymore.

1 What we have learned is that her company will
2 provide her past statements from a couple years ago during
3 the relevant time period of these calls for \$5 a month. We
4 have instructed her to pay that and get those statements,
5 and when we receive them for the relevant time period, we
6 will turn them over.

7 THE COURT: Are you aware of what her phone
8 company is, what phone company she uses?

9 MR. CAFFAS: I believe it's AT&T.

10 MR. PELUSO: Right.

11 THE COURT: Okay. You could also subpoena AT&T
12 yourself. I mean --

13 MR. CAFFAS: Your Honor, the reason that that has
14 not been done is because the representation has been that
15 Ms. Smith has access to those, and we're learning that now,
16 as of five days ago, she's now endeavoring to provide them.
17 But that is one of the factual -- that's one of the buckets
18 of factual evidence that we need to support the contentions
19 that are listed in Interrogatory 1.

20 MR. PELUSO: The point is, Your Honor, I do not
21 dispute that those cell phone statements would be --

22 THE COURT: Wait. They only have -- look, they
23 have to turn over what they have. Right. They -- you know,
24 if they don't have -- you know, I don't actually know that
25 they're legally required to go out and affirmatively seek

1 additional information that's not currently in the custody,
2 control or possession. Right. And that's why it's
3 perfectly appropriate for either party to subpoena third
4 parties to get information. Right. I think what will be
5 required of them is to disclose who the service provider was
6 during the relevant time period, and that way you can go out
7 and issue a subpoena. Right.

8 If they made a representation that they have it or
9 that they will get it, I appreciate that. I think that's
10 a -- that's a sign that they're -- that, clearly, it's
11 relevant, clearly it's material to the issues in dispute,
12 and, just as a matter of professionalism, they're trying to
13 go out and get this done in the most efficient way possible.

14 If it turns out, at the end of the day, you know,
15 what I will -- well, on that point, I guess what I would ask
16 the parties to do is, you know, for plaintiff to continue to
17 push that as quickly as they can, as efficiently as they
18 can.

19 If they cannot do so, I would say -- I understand
20 next week is Thanksgiving, but I'll give you guys until the
21 following Wednesday, the Wednesday after Thanksgiving, to
22 sort of provide what we need to provide and, you know,
23 comply with the Court's order today. Then if you're not
24 satisfied with that information, then -- they're either
25 unable or unwilling to do it, then you'll have time to issue

1 a subpoena to AT&T yourself. And I understand the backdrop
2 to that, and we'll be a little forgiving in terms of timing
3 if AT&T is not -- you know, doesn't respond within the time
4 period set by the Court; okay?

5 MR. PELUSO: Understood.

6 THE COURT: So, by the end of the day, if the
7 record still exists, the defendant will get them. Right.
8 There's no doubt about that. And -- you know, and I
9 appreciate plaintiff's efforts to -- you know, to
10 affirmatively go out and get them and provide them. It's
11 the right thing to do. It keeps this case moving forward.
12 But, if you can't, then you'll be able to get them directly
13 from the third party service provider; okay?

14 MR. PELUSO: And then the third, I guess, category
15 of documents that Ms. Smith does have and that we do not
16 think are discoverable are the settlement agreements from
17 completely unrelated cases that she may have had with other
18 defendants under the Telephone Consumer Protection Act.

19 THE COURT: That's -- I think that's an
20 interesting question. Let's talk about that.

21 Before we move on to that, is there anything else
22 you want to say about the phone records?

23 MR. CAFFAS: The Contention Interrogatories 1, 2
24 and 3 in general, yes. I don't think we're -- we've
25 completed the discussion as to those, Your Honor.

1 Specifically, in the supplemental response to
2 Interrogatory 1, there's also contentions for each and every
3 one of the calls that plaintiff has identified that, upon
4 information and belief, the call was made using what's
5 called -- a company called Five9 Dialing System, and there's
6 no factual support listed for that contention.

7 To the contrary, Your Honor, we've attached the
8 response that we've received from plaintiff for their
9 subpoenas to Verizon and AT&T which indicate to the
10 contrary. The majority of the caller ID numbers that
11 they've listed are not associated with Five9. Several --

12 THE COURT: I'm sorry. Where did that information
13 come up? From your subpoena or provided by the plaintiff?

14 MR. CAFFAS: Plaintiff had provided those in
15 response to their subpoenas after we had requested them as
16 part of the meet-and-confer process.

17 So four of the numbers that plaintiff lists as
18 the -- as calls that she received in her supplemental
19 response to Interrogatory 1 appear to be associated with, I
20 believe it's called First National Bank or First Capital
21 Bank, I can't recall, rather than Five9, which was
22 identified in response to another subpoena. And another of
23 the numbers was associated with an individual in Florida.

24 THE COURT: I'm not sure I'm totally following the
25 mechanics of this. But I think the larger picture is this,

1 I think all of what you've identified as these contention
2 interrogatories are appropriate. And I think that
3 plaintiff -- unless you can give me a reason, not sort of a
4 boilerplate objection, but a specific reason as to why I
5 shouldn't grant the defendant's motion to compel with
6 respect to each of those interrogatories, I'm happy to hear.

7 But, what I'm understanding is, plaintiff is
8 telling the Court and telling you that they have complied
9 with all of those interrogatories, that they have -- that
10 they've provided you what statements, what records they
11 currently have in their possession based on their efforts to
12 search their client's files, gather information that's in
13 their custody, control, possession, all of that. And what
14 I'm hearing from you, Counsel, and I may be wrong, is you
15 just either think there's more, or you want more specific
16 responses. You're not happy with their responses.

17 If you think that there is specific documents that
18 they have that they're not turning over, then I need you to
19 be specific as to what documents you think they have that
20 they're withholding from the discovery process, and why.

21 If you just think their answers are not specific
22 enough, you know, there's a part of me that just says
23 they're stuck with their -- they're the plaintiff, they have
24 the burden. If they -- you know, if they give you these
25 generalized, non-specific answers, right, they're not going

1 to able to carry their burden. They're not going to able
2 to -- you know, they're not going to be able to survive a
3 summary judgment motion. Right. And so --

4 MR. CAFFAS: My question -- I apologize if I
5 hadn't made that -- explained that properly in the first
6 place, Your Honor.

7 But if, for each and every one of plaintiff's --
8 the calls that she identifies and contends are associated
9 with this defendant are -- and the basis for that
10 contention, if they say, for example, for each and every one
11 of the calls, they make the statement "the purpose of this
12 call was to solicit a SunPath product," or something along
13 the lines of those. I would posit to the Court that that is
14 a contention that they need to list the facts that support
15 that contention.

16 THE COURT: I agree. I totally agree. And if
17 they failed to do it, then they're not going to be able to
18 present evidence at trial about why they contend that this
19 call was intended to elicit a SunPath product.

20 MR. CAFFAS: Uh-huh.

21 THE COURT: It's that easy.

22 You know, I'm not saying your interrogatories are
23 out of bounds. I don't think they are. And I'm not saying
24 that their responses are sufficient. But, you know, I
25 can't -- I can't force them to provide information that

1 is -- you know, that, at the end of the day, it's just going
2 to mean this case is -- you know, the plaintiff loses.

3 If they don't provide you specific facts as to why
4 they think these calls are related -- and, please, tell me
5 if you think I'm seeing this wrong. But my view is that if
6 you've asked that in that interrogatory, I've ruled that
7 it's an appropriate interrogatory and that they have to
8 respond, and lead counsel is saying, we're not objecting to
9 the interrogatory on any substantive basis, and they fail in
10 that answer specifically, and they fail to explain why they
11 think that call X, Y, Z were intended to elicit a SunPath
12 product, then they're not going to be able to present any
13 evidence of that at trial. They're not going to be able to
14 present any evidence in support of their position on summary
15 judgment.

16 So, I mean, I'm -- you know, if counsel is
17 saying -- you know, essentially what they're saying is we
18 don't have anything. If they don't have anything, they
19 don't have anything. If there is a reason why they think
20 that -- that these calls were intended to elicit a SunPath
21 product and they failed to disclose that, if I was the
22 defense, sometimes I would just keep my powder dry and just
23 say okay.

24 I mean, plaintiff's counsel, am I missing
25 something?

1 MR. PELUSO: I don't think so, Your Honor. I
2 mean, ultimately that's correct. It's our burden to show
3 the various elements of our claim.

4 THE COURT: And you came out -- and you came out
5 with your discovery responses.

6 MR. PELUSO: Correct.

7 THE COURT: And if you don't have anything to
8 corroborate it, to support it, then I suppose the plaintiff
9 will get up there and say, well, the person on the other end
10 of the phone said they were selling me a SunPath
11 fill-in-the-blank. And you depose the plaintiff and the
12 plaintiff says that, then you know at trial, you know, they
13 especially are limited to carrying their burden before the
14 jury, before the Court, by a preponderance, based solely on
15 plaintiff's uncorroborated statement. If that's all that
16 they've given you in discovery, that's all they're going to
17 have at trial.

18 MR. PELUSO: And the only other thing I would add,
19 Your Honor, is that, you know, we're still tracking down
20 information. There's outstanding subpoenas. When those
21 subpoenas are responded to and we receive additional
22 documents or information, we will turn them over.

23 Any questions that SunPath may have for Ms. Smith,
24 they can ask her at her deposition. There's just not
25 information or documents currently in our possession other

1 than those sort of three buckets that I've mentioned that
2 have not been turned over. So --

3 THE COURT: So what documents do you think they
4 have that they're not turning over? I understand you're
5 unhappy with the specificity of their response. But, you
6 know, what documents, what's responsive to the interrogatory
7 that you think they have that they're not turning over --

8 MR. CAFFAS: Your Honor, it's --

9 THE COURT: -- or disclosing?

10 MR. CAFFAS: I will just reiterate that it's clear
11 that the information that's been provided about the calls
12 that are detailed from 2020 that were specified for the
13 first time last week, that that information did not come
14 from Ms. Smith's memory. And there are clearly documents
15 and information that are in her possession, even if she
16 clearly has not accessed her specific phone records yet that
17 allowed her to list minute-by-minute --

18 THE COURT: I just --

19 MR. CAFFAS: -- call details.

20 THE COURT: -- think you need to depose her,
21 Counsel. Right. I mean, you're asking me to speculate
22 about what she has or doesn't have. Right. You're asking
23 counsel to disclose, you know, what are essentially
24 privileged communications with her lawyer.

25 The way to get through this is to depose the

1 plaintiff. And if it turns out that, you know, that you
2 need to depose plaintiff multiple times because information
3 keeps coming back in, then, you know, we'll look at that
4 when it comes. But I'm just not sure, at this point, what
5 you're asking the Court to do.

6 MR. CAFFAS: With regards to the information being
7 withheld regarding the call records, that's our position.
8 We were trying to avoid having to go back to the well again
9 and again potentially if things were resolved at the
10 deposition and have that upfront to be able to question her
11 about at deposition.

12 THE COURT: Let me ask you this, Counsel. Do you
13 disagree that any call records that would be -- that are
14 relevant to this time period that -- or that are within this
15 time period that are in your client's possession are not
16 properly discoverable?

17 MR. PELUSO: No. I agree that they are entitled
18 to those documents. The only thing I would add, as I said
19 earlier, is she no longer has those statements. Right. Not
20 everyone saves cell phone bills from two years ago. But she
21 has access, in the sense that AT&T can reprint them for her,
22 which we've instructed her to do, and then we'll turn them
23 over.

24 THE COURT: So what I'll do is, we will -- if this
25 issue isn't resolved by -- either your client doesn't get

1 these bills from AT&T or has some explanation as to why she
2 won't now or can't now, if this issue isn't resolved by -- I
3 mean, I hate to put any pressure on folks the week of
4 Thanksgiving. But if this issue isn't resolved by, say,
5 Wednesday, the 30th, so the Wednesday after Thanksgiving,
6 then I would ask the parties to contact my chambers, and we
7 will set this for a hearing on Friday, December 2nd.

8 MR. CAFFAS: And just to clarify, Your Honor, I
9 just want to make sure that we're not just talking about the
10 AT&T records that she was supposed to be trying to get her
11 hands on as of now. I'm referring to -- there would clearly
12 be -- to take a step back, if I were the plaintiff in this
13 case, when Ms. Smith came --

14 THE COURT: Well, I'll tell you what we're going
15 to do, though. So if these issues are -- I think -- it
16 sounds like these issues really probably are not totally
17 ripe for me to rule on right now. What you have is, you
18 have plaintiff saying we're trying to get our hands on this
19 information, we're working on this information, you haven't
20 even deposed the plaintiff yet to determine -- and you
21 have -- do you have that scheduled?

22 MR. CAFFAS: Well, our plan was to set it for the
23 2nd based on the outcome of this hearing and what will be
24 provided by that time.

25 THE COURT: Well -- all right. Well, I'm going to

1 order that everything that I order disclosed today be
2 provided by -- I was planning on doing it the Wednesday
3 after Thanksgiving so people weren't feeling like they had
4 to hustle around the holidays.

5 And -- and is the 2nd a date that you all have
6 agreed to for a deposition of the plaintiff?

7 MR. CAFFAS: It had been proposed by plaintiff.
8 We were --

9 THE COURT: Okay.

10 MR. CAFFAS: -- waiting for the outcome of this
11 hearing.

12 THE COURT: Well, let's do this. To the extent
13 that there are any open issues, right -- anyway, typically
14 in a discovery dispute, right, there's a discovery about
15 what needs to be provided. There doesn't seem to be a big
16 dispute here. Right. There's no dispute that if these call
17 records exist, they're entitled to them. The question
18 really is, how do you get them. When do you get them. Who
19 do you get them from.

20 If plaintiff is saying that they're making a
21 good-faith effort to get this information to you, right,
22 which, honestly, I'm not sure that they're required to do
23 legally, right, you could have subpoenaed this information
24 from AT&T at any point, but if you represent you didn't
25 because they told you they had this information or were

1 going to provide this information, I get it, right, we'll
2 get there.

3 What we'll do is, we'll have a status conference
4 on -- everything will be -- have to be disclosed that you
5 have. And I'm asking you to make every effort to get this
6 information -- and I know it's a short turnaround -- by
7 Tuesday. That will be the Tuesday after Thanksgiving,
8 November 29.

9 MR. CAFFAS: The 29th maybe.

10 THE COURT: Yeah. If we need to, we'll have a
11 hearing on Thursday, the 30th. And that will give you at
12 least -- so everything should be turned over by Tuesday. It
13 will give you a few days to prepare before your deposition
14 on Friday. If we need to have a hearing, everybody can come
15 in, and we'll have a hearing on Thursday to resolve as much
16 as we can. If you need to have multiple depositions of the
17 plaintiff, then, you know -- because information keeps
18 coming in at this stage, you know, maybe you can have
19 multiple shots at the plaintiff.

20 But, guys, you're at the 11th hour. When's your
21 final pretrial?

22 MR. CAFFAS: I don't know offhand, Your Honor. I
23 know that discovery closes on the 9th, but that's the only
24 thing I --

25 THE COURT: All right. So your final pretrial

1 would then be sometime later that week or the following
2 week.

3 So when discovery closes on the 9th, discovery
4 closes on the 9th. Right. I mean, that's -- that's pretty
5 much going to be a hard deadline. So -- all right. But,
6 you know, right now if you're asking me -- the question
7 isn't, are these records discoverable. Right. The question
8 is, where do you get them from and when.

9 MR. CAFFAS: And has plaintiff provided all the
10 factual evidence that supported her contentions.

11 THE COURT: You know, by answering their own
12 interrogatory, that's what they're representing. You know,
13 again, I don't know how we can keep going around in a
14 circle. Right. If -- you know, if they give you an answer,
15 they are stuck with their answer. You know, it sounds like
16 you want more from them, and I'm not sure, if I were
17 defending this case, why I would want too much more from
18 them. If they're giving you a little bit, that means they
19 only have a little bit to support their case. They're not
20 going to be able to ambush you, if that's what you're
21 worried about. They are not going to be able to ambush you.
22 They're not going to be able to say -- you know, discovery
23 ends on the 9th. They're not going to be able to make a
24 discovery production -- you know, if you're -- your trial
25 will probably be set in March. They're not going to be able

1 to give you a discovery production in January or February
2 and say, oh, well, now we are -- you know, we're
3 supplementing what we should have given you two months ago.
4 No way that's happening.

5 MR. CAFFAS: Understood.

6 THE COURT: I mean, I don't want to speak for the
7 district judge, but I can tell you, that's just generally
8 not how the Court rules.

9 So, you know, it's up to the plaintiff to either
10 object and say we don't want to turn this information over
11 because we're not required to, or under the rules we
12 shouldn't, or here's why we don't want to turn it over.
13 Right. In which case we wrestle with those issues. But if
14 they answer, they're stuck with it.

15 You're frustrated because you don't think their
16 answer is specific enough. If it's not that specific, then
17 their case in chief is not going to be very specific. If
18 they're relying on the testimony of their -- of the
19 plaintiff, then they're relying on the testimony of the
20 plaintiff. If they're providing you no other bases, then
21 they have no other bases to argue at trial or in their
22 summary judgment motions. I don't know what else to tell
23 you.

24 But you want me to order them to be more specific.
25 I can't do that. I can order them to comply with the

1 interrogatory, or I can order them to answer the
2 interrogatory, I can order them to fully answer the
3 interrogatory, I can order them to represent that the answer
4 is based on a professional, reasonable, careful review of
5 all the records and data in the custody or control of their
6 client. But I can't write the answer for them. And that's
7 why I'm just not sure, beyond that, what you want me to do.

8 MR. CAFFAS: Beyond what we've already discussed
9 as it relates to the response to Interrogatory Number 1, I
10 think I'm satisfied, at this point, with Your Honor's
11 analysis.

12 THE COURT: You know, to the extent that there is
13 a dispute -- and, you know, the order today is going to
14 read: "For the reasons stated on the record, defendant's
15 motion to compel is granted." Because the only real
16 objection before the Court, which it seems like it was
17 almost -- was essentially withdrawn, was the objection that
18 it was premature. Right.

19 So, you have -- you will have an order of the
20 Court that your interrogatories are proper and that
21 plaintiff has to comply with the interrogatories.

22 MR. CAFFAS: Your Honor, in that vein, might I ask
23 that it would be appropriate that the objections that these
24 requests are premature either be withdrawn or stricken on
25 that basis then?

1 THE COURT: Well, it's going to be denied. It
2 doesn't matter; right? I mean the order is going to say
3 that your motion to compel is granted.

4 MR. CAFFAS: Uh-huh.

5 THE COURT: That's how we do it.

6 MR. CAFFAS: Understood.

7 THE COURT: For reasons stated on the record.

8 MR. CAFFAS: Understood, Your Honor.

9 And then to move on to the next two contention
10 interrogatories. The issue that SunPath takes with
11 plaintiff's current supplemental responses to
12 Interrogatories 1 and 2 are that these are asking for
13 plaintiff to provide the basis for her contention that calls
14 are either -- sorry, SunPath is either directly or
15 vicariously liable for any of the calls at issue, which
16 would ideally provide SunPath to address whether each call
17 they're alleging a theory that SunPath is directly liable,
18 it made these always itself; or a third party, supposedly at
19 SunPath's behest, made those calls.

20 As it stands right now, there are no
21 differentiation between which calls plaintiff alleges were
22 directly or vicariously made by SunPath or any other party.
23 There's not a single call specified in the answer to the
24 supplemental response to Interrogatory 2 or 3. In fact,
25 part of the supplemental response to Interrogatory 3 simply

1 references the response to supplemental Interrogatory 2.

2 THE COURT: So it's an appropriate interrogatory,
3 it's an appropriate request, right, for you to identify
4 which calls you think SunPath is directly responsible for
5 versus which calls your client received that you think
6 SunPath is vicariously responsible for. If you're able to
7 distinguish them -- if you're not able to distinguish them,
8 that's a proof issue, right, and you're going to have to --
9 you know, you're -- it sounds like if you're not able to do
10 that in the discovery process, you're going to have proof
11 challenges at trial, if you get to trial.

12 So, you know, it's an appropriate interrogatory.
13 If you have that information, unless you can tell me a
14 reason why you shouldn't provide it, you need to identify
15 it, you need to provide it, you need to state it with
16 specificity, and you're stuck with your answer.

17 MR. PELUSO: Understood, Your Honor. There is no
18 dispute that SunPath did not make any of the calls directly.
19 So that's been true since the beginning of the case. I
20 don't think we've ever alleged that your client directly
21 made the calls, only that third parties did on its behalf.

22 So, to the extent Your Honor would like us to, I
23 don't know, supplement the interrogatory to specifically
24 state that, we can. But there's no argument, from our end,
25 that SunPath affirmatively made the calls itself.

1 MR. CAFFAS: Did not.

2 MR. PELUSO: Did not, correct. Yeah. We're not
3 contending that.

4 THE COURT: Do you have any evidence or anything
5 in your files that suggest that there is a third party who
6 was acting at SunPath's direction that made the calls? That
7 also seems to be within the boundaries of the interrogatory.

8 MR. PELUSO: Correct.

9 THE COURT: And if you have it, provide it. If
10 you don't, don't. I mean, that's -- you know, again, I
11 think we're still circling the same wagons here. Right.
12 And plaintiff is not objecting to the scope, the
13 appropriateness of your interrogatories. They're just
14 telling you, as I understand it, this is all we've got.

15 MR. PELUSO: That's correct, Your Honor. And,
16 again, the only -- there's those three sort of buckets of
17 information that we have that -- or have access to that have
18 not been turned over for various reasons. You know, we
19 discussed the first two, which were that -- our own internal
20 Excel spreadsheet, which is work product; the statements
21 from AT&T, which we're having our client work to get, and
22 we'll turn them over when we receive them; and then the
23 settlement agreements from completely unrelated matters.
24 Other than those three buckets --

25 THE COURT: We'll get to that in a second.

1 MR. PELUSO: Other than those three buckets, I
2 don't have any additional information to provide the
3 defendant. And I feel like we're just kind of stuck in the
4 mud here sort of having the same discussion and argument
5 when I don't have anything else to turn over.

6 THE COURT: I got you. And we also don't have a
7 lot of specifics from the defendant as to what they -- you
8 think they have that they're not turning over. But that --
9 aside from that -- right. I still think we're back to the
10 same spot that I can tell by your look, you and I just
11 really aren't connecting on, which is, you know, you can't
12 make them give you information they don't have. You can't
13 make them be specific if they don't want to be specific.
14 They are stuck with their answers.

15 Now, maybe that's good enough. Maybe they can
16 convince a jury based solely on the testimony of their
17 plaintiff. That's a proof issue. Right. But, you know, if
18 you think that there is something -- and it doesn't sound
19 like there's anything in there -- well, let me back up.

20 You know, if they're representing this is all
21 we've got, and you don't have any reason to suggest that
22 that's not all they have -- and I can't order them to
23 provide things that they don't have. I can order them to
24 be -- to respond to your interrogatories, to respond fully
25 to your interrogatories. They're appropriate. But you're

1 stuck with the answer. They're stuck with the answer.

2 MR. CAFFAS: Yes. I believe I understand that,
3 Your Honor. I just -- specifically with regards to the
4 testimony that we've just -- sorry, not the testimony, but
5 the arguments that we've just raised with respect to these
6 two contention interrogatories, Number 2 and Number 3, there
7 seems to be a concession that plaintiff's not withholding
8 anything, isn't waiting on anything, knows the answer to
9 specifically supplemental response Number 2, which the
10 supplemental answer starts by stating: "The contention
11 interrogatory is grossly premature," and that they're
12 supposedly --

13 THE COURT: We've gotten past that. The answer is
14 on the record, and I would ask counsel to supplement it in
15 writing, you know, to the defense that the plaintiff does
16 not take a position that SunPath was the -- was the -- you
17 know, was the entity making these calls, or rather there was
18 a third party doing it on behalf of SunPath, and, therefore,
19 SunPath is vicariously liable for the actions of others
20 acting on their behalf.

21 Is that the position of the plaintiff?

22 MR. PELUSO: Correct, Your Honor. There's --

23 THE COURT: It's on the record. We are being
24 recorded. But I would ask -- I would ask plaintiff to
25 supplement the interrogatory response to clarify that, and

1 then that's what there is. And to the extent that you've
2 asked, identify other third parties that you know about,
3 identify other third parties who were acting vicariously on
4 behalf of SunPath or any information you have or anything
5 along those lines. If the answer is we don't know, then the
6 answer is they don't know.

7 MR. CAFFAS: Understood, Your Honor. And I
8 apologize if I am beating a dead horse here, but we would
9 expect there --

10 THE COURT: I think we crossed that bridge a while
11 ago, but that's okay.

12 MR. CAFFAS: We would expect their response to
13 list the calls associated with their theories of liability.

14 THE COURT: And I think that's fine. I think
15 that's fair. And I didn't think that's in dispute.

16 You have to list the specific calls, and I thought
17 that's what was already agreed to. I think that was in --
18 you know, if you've alleged your -- if the plaintiff has
19 alleged that they received 50 calls between X date and Y
20 date from a third party acting on behalf of SunPath, then
21 they need to identify for SunPath which 50 calls they're
22 alleging. That seems entirely reasonable. I didn't think
23 that was necessarily in dispute.

24 MR. PELUSO: I don't think it is, Your Honor. I
25 think we did that. To the extent you think that we didn't,

1 let me know, and we'll try to correct that problem.

2 MR. CAFFAS: Understood. All right. I think
3 we've discussed it, but the discrepancy was what wasn't
4 specified in the responses to 2 and 3.

5 THE COURT: I got you. I got you. Sometimes this
6 process just helps clarify things for everybody.

7 MR. CAFFAS: All right. Your Honor, the next --

8 THE COURT: I do have a conference call at 11 that
9 what I would ask -- and, of course, our clock has said 10:25
10 for about the last six months. So, if you guys don't
11 mind -- it's five of. If you don't mind -- this won't take
12 very long -- can I just take a brief recess. Let me handle
13 this conference call, and let us reconvene at about 11:15,
14 if that works.

15 MR. CAFFAS: It works for us, Your Honor.

16 MR. PELUSO: Works for me.

17 THE COURT: Okay. Thank you, all.

18 (A brief recess was taken from 10:57 a.m. to 11:21 a.m.)

19 THE COURT: All right. So does that leave us with
20 the settlement issue, or are there other issues as well?

21 MR. CAFFAS: There's also the issue of -- there's
22 also the issues as to the response to Interrogatory 18 and
23 the supplemental initial disclosures in the calculation of
24 damages.

25 THE COURT: Okay. Pick -- which one of those

1 issues do you want to go through first?

2 MR. CAFFAS: So they're corresponding issues. The
3 initial disclosures, as Your Honor is aware, the plaintiff
4 is required to provide a calculation of the damages for
5 their claims. The -- Interrogatory Number 18 essentially
6 requests similar details. So the issue is, what are the
7 calculation of the damages for their claims. And plaintiff,
8 even in supplemental responses, has just pointed to the
9 statutory damage provision and provided lump sums, which is
10 deficient under the definition -- under -- which is required
11 under Rule 26 regarding the damage claim calculations.

12 THE COURT: Okay.

13 MR. PELUSO: Your Honor, I'm not sure what else we
14 could supplement to add other than what we already have.

15 THE COURT: Well, what would --

16 MR. PELUSO: The statute provided --

17 THE COURT: I'm sorry. Go ahead.

18 MR. PELUSO: Sorry, Your Honor.

19 These statutes provides statutory damages in the
20 amount of \$500 under the TCPA, or under the Virginia state
21 court claim, it's \$500, which reaches up to 5,000 after a
22 certain number of calls. I think it's two or three calls,
23 it all of a sudden jumps to 5,000.

24 So we've kind of done the math based on the calls
25 that we allege are violative. I think it's 54, give or

1 take. So if you just kind of do the math, the number of
2 calls times the statutory damages available, that's what
3 we've provided. I'm not really sure what else the defendant
4 would like us to do.

5 THE COURT: If that's all they're seeking, why is
6 it -- you know, I'm not saying -- I'm in the ruling on
7 whether or not, you know, they're entitled to it or not
8 entitled to it, but if the statute says it's 500 -- if they
9 said we're alleging 54 violative calls in our claim, and the
10 statute provides damages for \$500 per call up until X and
11 \$5,000 per -- whatever the statute specifically requires, do
12 you want them to just basically lay that out and do the math
13 and say here are the 54 calls, here are the first three
14 calls that we think we're entitled to \$500 in damages for,
15 here are the rest of the damages where we think we're
16 entitled to \$5,000 per call for?

17 MR. CAFFAS: Yes, Your Honor. It's not what we're
18 asking for; it's what the rule requires.

19 THE COURT: That's fine. I would have them do
20 that. You know, lay out which -- just specifically say
21 which -- you know, again, sort of ties all together. But I
22 do think, for the claim to move forward, you do have to
23 identify specific calls. And if there are damages
24 associated with each call, I think -- I think -- I
25 understand what you're saying, which is, hey, it's pretty

1 clear -- I probably could just read the statute, but I think
2 it is appropriate to just specifically lay it out.

3 MR. PELUSO: Just so I understand, Your Honor, so
4 instead of just saying, you know, 54 calls, these are the
5 statutory damages, therefore the total damages sought are X,
6 Your Honor would like us to go through -- list each call and
7 say 500, 500, 5,000, or give just kind of a lump sum? I
8 just want to make sure I understand what Your Honor is
9 ordering me to do so I can make sure I comply.

10 THE COURT: Why is -- why couldn't they just say
11 we have 54 calls, here are the 54 calls under the statute,
12 you know, we're alleging damages for this amount? Why is
13 that not sufficient?

14 MR. CAFFAS: Well, we addressed this partially in
15 our -- that's just one example included in our reply brief,
16 Your Honor. They might be saying that there's 54 calls, but
17 there's separate types of violations in each of the damage
18 provisions for the three separate counts they're suing
19 under.

20 For example, one of the counts is under the
21 Virginia Telephone Privacy Protection Act, which only
22 applies to calls --

23 THE COURT: Good point.

24 MR. CAFFAS: -- that were answered and the party
25 answered and the party didn't identify themselves by first

1 and last name. But there's a large number of calls that
2 plaintiff describes as unanswered. So the calculation -- I
3 mean, to kind of sum up the issue, they said -- they're
4 asking if they need to show their work. They said they've
5 done the work; they need to show it.

6 THE COURT: Fair point. I think that's a fair
7 point, yes.

8 For each call that you've alleged is violative to
9 the statute, all the material information that's relevant to
10 the damage calculation, whether -- you know, that has to
11 be -- that has to be set out with specificity. Yes. I
12 think that's correct.

13 MR. PELUSO: Okay. Understood.

14 MR. CAFFAS: And I believe that's the only -- that
15 encompasses the issues under both Interrogatory 18,
16 supplemental response, and the initial disclosure.

17 THE COURT: Okay. Okay.

18 MR. CAFFAS: So then the remaining issue, Your
19 Honor, would be regarding the settlement agreements that
20 Ms. Smith has -- is withholding.

21 THE COURT: So you're seeking settlement
22 agreements between Ms. Smith and previous defendants who she
23 has either sued or anticipated suing in which there was a
24 settlement agreement between Plaintiff Smith and those
25 other -- and those other entities; correct?

1 MR. CAFFAS: If you'll give me a minute, Your
2 Honor, I believe there's three separate discovery requests
3 that are a little bit more broad than just settlement
4 agreements. It would be communications involving formal and
5 informal disputes in which she was the plaintiff. But that
6 is a broad summary of the issue that's presented with these
7 three supplemental responses we're seeking, yes.

8 Yeah. Specifically we're referring to
9 Interrogatory 21 and Document Request 11 and 14.

10 THE COURT: How's that relevant to this cause of
11 action?

12 MR. CAFFAS: Your Honor, as a threshold manner, I
13 would like to first point to the basis of the objections
14 that are raised in response to these.

15 There's no question that there is information
16 that's being withheld, and the basis of withholding them is
17 they're supposedly -- the requests are unduly burdensome and
18 unduly broad without any kind of specificity as to why that
19 is the case. And there is no dispute that there are
20 settlement agreements that are being withheld.

21 So I would say there's a threshold matter, that I
22 would request that that objection be stricken, and if
23 there's any determination, it would just be the relevance,
24 which is just if there is probative value to --

25 THE COURT: Yeah. I don't think it's overly

1 broad. I don't think it's unduly burdensome, but why --

2 MR. PELUSO: I agree. That objection is the
3 boilerplate that we shouldn't have made, but definitely stay
4 on the relevance.

5 THE COURT: I understand.

6 But where are we on the 26(b)(1) issues? Right.
7 Where are we on -- why is that relevant to this cause of
8 action?

9 MR. CAFFAS: So there's several reasons that we've
10 submitted in both of our briefs. But the main issue is that
11 we're -- based on the uncertainty as to the parties that are
12 involved here. For example, the parties that are alleged to
13 have made the call or calls at issue here are third parties
14 that aren't captive to SunPath. They could be marketing the
15 product of SunPath competitors, they could be marketing
16 products of people that sell insurance products or home
17 security systems or nutritional products. They're not
18 required to be --

19 THE COURT: I got you.

20 MR. CAFFAS: Yeah.

21 -- captives of that party. So based on the lack
22 of specificity as to who those parties might be --

23 THE COURT: I have you there.

24 MR. CAFFAS: Yeah.

25 THE COURT: There's no question they need to tell

1 you specifically which parties they have -- they have
2 engaged with. Let me -- I'll hear from Counsel, but I
3 think -- what else do you need from the settlement
4 agreements?

5 MR. CAFFAS: There would be the possibility that
6 Ms. Smith has signed a release with this party releasing
7 that party and any of their affiliates, parent companies,
8 subsidiaries that could apply to SunPath or potentially
9 another party that made the calls in this issue, even if she
10 didn't sue for a specific call that she's suing SunPath for
11 here. That would certainly be relevant to our claims and
12 defenses in this case.

13 THE COURT: I agree.

14 MR. CAFFAS: Yeah.

15 THE COURT: What else do you need from the
16 settlement agreements?

17 MR. CAFFAS: Well, in addition to the settlement
18 agreements, it would be anything memorializing the formal or
19 informal demands.

20 THE COURT: Why?

21 MR. CAFFAS: For example -- because -- similar
22 reasons, Your Honor. If Ms. Smith says she received a call
23 from somebody and reaches out and makes a demand to that
24 person, that would be memorializing what could have created
25 an established business, if, on that call, she made an

1 inquiry about that product and then created an established
2 business relationship with that caller, that then -- and
3 then that caller potentially is responsible for some of the
4 calls at issue here, that would be relevant information that
5 goes to --

6 THE COURT: You mean that individual person or
7 that there would be -- or the entity?

8 MR. CAFFAS: The entity that they are calling --

9 THE COURT: Wouldn't that be covered by the -- so
10 if I enter an order, hypothetically, that just says:

11 "Plaintiff is required to disclose to defendant all
12 settlement agreements, formal or informal, in which -- and
13 identify the parties who she has settled with and identify
14 the specific terms of any releases that she has engaged in
15 or that she has executed," right, why is that not enough?

16 MR. CAFFAS: I think it would also include -- need
17 to include, Your Honor, the dates of the settlements that --

18 THE COURT: The dates. The dates of the
19 settlement agreement and the dates the agreements cover.

20 MR. CAFFAS: Correct. And I think this would fall
21 under what you're stating, but it would also need to include
22 the claims -- the basis for the claims that those settlement
23 agreements arose from, if that makes sense. So if it's for
24 calls that occurred during the relevant time period or not,
25 that would be something that would obviously be relevant to

1 what we're seeking here.

2 THE COURT: Well, that would be covered by the
3 dates; correct?

4 MR. CAFFAS: Yeah. I didn't want to confuse, for
5 example, if a settlement agreement was executed on
6 April 21st, 2022, versus it was for calls that occurred on
7 April 20th of 2020.

8 THE COURT: Well, I think they have to disclose
9 both.

10 MR. CAFFAS: Right.

11 THE COURT: Both the time period in which the
12 settlement agreements covers, the date that the settlement
13 agreements was entered, who the parties to the agreement
14 were, and the scope of the release. It seems like from -- I
15 think -- I take your point, I think, but I am trying to just
16 kind of narrowly tailor this, because I'm not sure that it
17 should be a complete free-for-all.

18 For example, one of the things you asked for is
19 the specific monetary compensation.

20 MR. CAFFAS: Well, Your Honor, that --

21 THE COURT: Why's --

22 MR. CAFFAS: Sorry.

23 THE COURT: No. Go ahead.

24 MR. CAFFAS: That would go to her potential
25 fitness as a class representative. In one of the cases we

1 cited -- I believe it was *Roman v. Pierce* that was just
2 decided in the last couple of weeks -- that plaintiff's
3 fitness and motivations as a class representative and the
4 monetary amounts they would have received in separate
5 settlement is relevant to, at the very least, their
6 credibility before a jury.

7 THE COURT: Okay. Anything else along those lines
8 from you, Mr. Caffas? Anything else?

9 MR. CAFFAS: No, I don't believe that we have
10 anything else to add, pending anything Mr. Peluso has to say
11 that we would need to respond to.

12 THE COURT: All right. Mr. Peluso.

13 MR. PELUSO: Yes, Your Honor. I don't really have
14 a lot of objections to most of what Your Honor was just
15 talking with Mr. Caffas about. You know, as far as
16 providing them with a list of defendants who Ms. Smith has
17 settled with before, the dates of those settlement
18 agreements, the -- I guess the call range that was the
19 subject of those settlements, that all seems reasonable.

20 THE COURT: And the scope of the releases, who
21 exactly is being released.

22 MR. CAFFAS: Right. And the scope of the release.
23 That's all fine.

24 I think the financial part, though, is a bridge
25 too far, and I just -- I really struggle to see what that

1 has to do with her fitness as a class representative. It's
2 obviously highly confidential information, and I don't
3 really -- I guess I don't see what that has to do with her
4 willingness in this case to put her name on the complaint,
5 participate in discovery, sit for a deposition, testify at
6 the trial, you know, kind of stand up and be a class
7 representative.

8 What she was paid to settle a prior case, I'm just
9 not really sure what that has to do with her fitness to
10 serve as a class rep here.

11 THE COURT: It also implicates the interest of the
12 entities with whom Ms. Smith had settled with; right? I
13 mean, it's --

14 MR. CAFFAS: If I could respond, Your Honor.

15 I would just generally say that confidentiality is
16 not a basis to be withholding anything. We cited this in
17 our reply brief. And if there's a concern about
18 confidentiality, we can enter a protective order, and that
19 won't be shared with anything besides --

20 THE COURT: So walk me through the relevance of
21 the -- of how you think the specific terms of the settlement
22 agreement impact your suitability as a class representative.

23 MR. CAFFAS: As I've already stated, Your Honor,
24 at the very least, there is a question of her credibility
25 before a jury based on her motivation for participating in

1 this lawsuit as a threshold issue. We've cited authority in
2 our briefs that states that courts have found this relevant
3 before, and it is a relevant determination based on the
4 balancing test per Rule 26.

5 THE COURT: Well, I'll tell you what I'm going to
6 do. I'm going to deny that at this point. If they seek to
7 certify this as a class, I will -- I'll revisit that
8 requirement.

9 But, at this point, there's no motion to certify a
10 class based on what we currently have before the Court.
11 This case is pushing ahead. It doesn't seem like that is
12 going to be a heavy lift. If there is an effort to certify
13 a class, we can revisit that issue.

14 But I think, based on the current posture of the
15 case, I will order the plaintiff to provide a list of all
16 parties with whom she has settled, the date of the
17 settlement agreement, the timeline -- or the time period for
18 which the settlement covers, as well as the scope of all
19 releases executed. And if they make an effort to -- and
20 that is done without prejudice to the defense motion or
21 ability to revisit this issue, if there is an effort to
22 certify a class.

23 MR. CAFFAS: Understood, Your Honor.

24 MR. PELUSO: Just one quick request for
25 clarification. Are we just talking about settlement

1 agreements related to telemarketing TCPA or any, you know,
2 related state -- statutes, you know, related to
3 telemarketing calls; or are we talking about just any
4 general settlement agreement from, I don't know, she got bit
5 by a dog, right, something -- unrelated subject matter?

6 THE COURT: Well, I -- look, I think that if --
7 the purpose is to try to identify if there's any overlap.
8 Right. Essentially. If there's any overlap between any
9 prior settlement agreement and any entity that is either
10 SunPath or associated with SunPath. And we're talking about
11 a relatively short time frame. Right. My understanding is
12 it's just from 2017 until now. Is that all you've asked
13 for?

14 MR. CAFFAS: I believe so. I can double check
15 the --

16 THE COURT: I think that's what it says in 21.

17 MR. CAFFAS: 21.

18 THE COURT: So if we're just talking about the
19 last five years, I think to err on the side of caution, I
20 would ask plaintiff to -- or direct plaintiff to provide all
21 settlement agreements that she's entered into.

22 If there is something that is clearly beyond the
23 scope, right, you know, for example, like a medical
24 malpractice issue or something like that, that is -- raises
25 privacy interests and is clearly outside the bounds of this

1 cause of action, then you can submit something ex parte in
2 camera to exclude that. But since we're only talking about
3 the last five years --

4 MR. PELUSO: It's probably not going to be that.

5 THE COURT: It's probably not going to be too
6 much. But, if there is something, I'd be happy to look at
7 it.

8 MR. PELUSO: Understood, Your Honor.

9 MR. CAFFAS: Understood, Your Honor.

10 THE COURT: All right.

11 MR. CAFFAS: And, I apologize. There was one
12 other issue that we had raised that was the -- whether the
13 request for admissions to -- request for admissions 7, 8 and
14 16 should be deemed admitted. And we believe that, based on
15 the evasiveness and the non-answers provided in both the
16 initial answers and supplemental answers, they should be.

17 MR. PELUSO: This was 7, 8 and 16?

18 MR. CAFFAS: 7, 8 and 16.

19 And, Your Honor, the issue that we have is that
20 the questions were all posed in the present sense. We're
21 asking for what knowledge or information Ms. Smith has in
22 her possession, custody or control. And the non-answer that
23 was received was basically something along the lines that
24 she wasn't able to answer based on what she has. And, at
25 present, months later, we're still getting an answer that

1 she doesn't know what she has. This was timely and
2 appropriate when it was served, and there's no reason why
3 she just can't give a simple admit or deny.

4 THE COURT: All right. So let's go through them
5 real quick. Let's just go through them.

6 So what is request for admission 7? Can you just
7 read that into the record? What's 7?

8 MR. CAFFAS: Your Honor, request for admission 7
9 states that: "You are in possession of no written or audio
10 evidence that SunPath, or any party allegedly acting on
11 SunPath's behalf, contacted you via your cell phone -- your
12 cell phone -- excuse me -- your cellular telephone number
13 before May 26, 2020."

14 And the initial response was: "At this time,
15 plaintiff lacks sufficient knowledge and information to
16 either admit or deny this request."

17 And the supplemental response, it's very lengthy.
18 I can read that into the record, Your Honor, as well if
19 you'd like.

20 THE COURT: I'm reading it. All right.

21 All right. Mr. Peluso, anything you want to say
22 on that?

23 MR. PELUSO: Your Honor, I think our supplemental
24 response, you know, lays it out. We admit that she's not
25 currently in possession of any audio evidence. We admit

1 that she's not presently aware of any written evidence. But
2 it sort of clarifies that we're working on accessing the
3 cell phone bills, and that may provide some additional
4 information responsive to this request. And we're not --
5 we're not trying to hide the ball. We're, you know, going
6 through, I don't know, three or four sentences here, trying
7 to explain exactly what we admit and what we don't know.

8 I guess the point is, Your Honor, we don't want to
9 just simply say -- we don't want to deny and then turn
10 around two weeks later and get information from AT&T which
11 we've kind of pivoted to an admit. So we're trying to
12 explain the sort of chain of logic here as opposed to just
13 denying the request. We're trying to actually give the
14 defendant some insight into where we are.

15 MR. CAFFAS: Your Honor, if I might respond.

16 THE COURT: Sure.

17 MR. CAFFAS: I think Mr. Peluso has just revealed
18 that the answer has and still remains that this is admitted.
19 If there's some reason that he might need to supplement it,
20 he can do so when that is necessary. But, based on the
21 bounds of Rule 36, if an answer is evasive when submitted in
22 a timely fashion -- and these were submitted back in
23 September -- it should have been admitted then. We're here
24 in mid-November, and we're still receiving non-responses.
25 So -- especially considering that the representation seems

1 to be that, at present, it is admitted.

2 MR. PELUSO: Well, and that's what it says, Your
3 Honor. I mean, we're not trying to be evasive. The
4 supplemental response says: "Plaintiff admits she's not
5 currently in possession of audio evidence." "Plaintiff
6 admits she is not presently aware of any written evidence."
7 So we're not trying to be evasive; we're --

8 THE COURT: It does seem like they've admitted the
9 key issues there. And if -- and if what changes that is,
10 you know, they get more records from AT&T, if that's all
11 that changes, well, the defendant's on notice of that.

12 But what I read that to be is -- and if you think
13 it's not clear, we can clarify it now, is, as Counsel said,
14 they're admitting that they're not in possession of any
15 written or recorded evidence in that regard.

16 So I'm just not sure what the dispute is. It
17 sounds like -- it sounds like it is admitted, based on the
18 current -- based on where things stand now, it is admitted.
19 If there is a little bit of an exception, defendant is aware
20 of it. And, quite frankly, you know -- and, again, this is
21 a little bit off topic here, but -- and I'm not sort of in
22 the habit of suggesting how a party should move forward.
23 But, given the fact that, with respect to the AT&T
24 information, you know, you thought it was in their
25 possession, it's not in their possession, they're trying to

1 get it from AT&T, it seems to me it would be pursuant for
2 the defendant to issue their own subpoena. If you wind up
3 getting the same information twice from the defendant, from
4 AT&T, that's fine. And I appreciate the plaintiff, again,
5 you know, making those efforts. But, you don't have that
6 much time. And it is sort of your responsibility to make
7 sure that your client gets the information if you now know
8 that it's in the possession of a third party.

9 But, you know, I've looked at the response, and
10 it's a little bit of a long-winded response, but,
11 essentially, I -- I read request for admission 7 to be
12 admitted. And, again, if there's a little bit of a caveat
13 there, you know, it's not something that you're going to be
14 ambushed with. You know, it's going to deal with that AT&T
15 information.

16 Is that correct?

17 MR. PELUSO: Yes, Your Honor.

18 THE COURT: So I think I would -- if I were you,
19 sir, I would declare victory and move on to the next one.
20 It seems like it's admitted.

21 MR. CAFFAS: Understood.

22 And 8 is essentially requesting the same
23 information for a different time period. So can I assume
24 that the analysis there would be the same?

25 MR. PELUSO: I think our response, Your Honor, is

1 almost identical.

2 MR. CAFFAS: Yeah. It's a --

3 THE COURT: Yeah. So 7 and 8 are admitted.

4 MR. CAFFAS: And, with respect to Number 16, Your
5 Honor, which reads that: "During each of the calls
6 described in paragraphs 23 and 24 of your complaint, the
7 caller did not state that he or she was calling from or on
8 behalf of SunPath."

9 THE COURT: And what was the supplemental response
10 to 16?

11 MR. CAFFAS: The -- so I'll read the -- they're
12 relatively short, so I'll read both.

13 The response is: "At this time, plaintiff lacks
14 sufficient knowledge and information to either admit or deny
15 this request." And the supplemental response is deny. "For
16 every call that was answered or that left a voice mail
17 message, the caller did not identify themselves by first and
18 last name. The complete breakdown of the calls at issue can
19 be found in plaintiff's supplemental response to
20 Interrogatory Number 1."

21 Now, I will just note that this doesn't respond to
22 the request.

23 THE COURT: It doesn't answer the specific
24 question. Right.

25 MR. CAFFAS: And I would, again, ask that, at this

1 stage, it was not responsive whenever the initial response
2 was submitted. And, paired with Rule 36, it should just be
3 deemed admitted.

4 THE COURT: What I'm going to do is, I'm going to
5 give them a little bit of a -- I'm going to order plaintiff
6 to respond with specificity to specifically admit or deny by
7 Wednesday.

8 MR. CAFFAS: And we have nothing further, Your
9 Honor.

10 THE COURT: And Wednesday is the 23rd. Okay.

11 Anything else that you -- that we can wrestle with
12 today that would keep you guys in a position to keep moving
13 this forward?

14 MR. CAFFAS: I don't believe so, Your Honor.

15 THE COURT: All right. Is there any use to even
16 talking about any sort of settlement at this point, or are
17 the parties just -- the class issue or other issues are just
18 going to make that not productive at this point?

19 MR. CAFFAS: Yes. At this point, I think the best
20 way to summarize the position is that, based on plaintiff's
21 assessment of damages in this case, even the individual
22 settlement discussions that have been had have not been
23 productive.

24 THE COURT: Well, I specialize in not productive
25 settlement discussions, and it's my job to make not

1 productive settlement discussions productive. So -- and I
2 will tell you -- and this is Judge Brinkema?

3 MR. CAFFAS: Yes, Your Honor.

4 THE COURT: I can almost assure you that, at some
5 point, Judge Brinkema will order you to undergo a settlement
6 conference. So, at some point, the three of us will be in a
7 settlement conference together with your clients. You know,
8 she won't do it until you get to the -- you know, the final
9 pretrial era, you know, either right before or right after
10 the pretrial. But it's going to happen at some point. So,
11 you know, sometimes it's better to have them sooner rather
12 than later.

13 I'm not going to say it's going to be fruitful.
14 Whether to settle is obviously exclusively in the control of
15 the parties. But we will probably all, at some point, be in
16 a room together talking about whether we can't find common
17 ground or not. If there's going to be an effort to certify
18 this as a class, it probably doesn't make sense to do it
19 until that effort has run its course. But, you know,
20 maybe -- you know, that's up to you guys to talk to your
21 clients and figure out a little bit of -- a little bit of
22 timing. But I do suspect that she's going to want to --
23 before this will go to trial, she's going to want to have us
24 give it a shot; okay?

25 MR. CAFFAS: Yeah. My only other position on

1 that, Your Honor, is that I concur with the position that it
2 might be premature because it's our understanding that
3 plaintiff still does intend to try and certify a class, and
4 there may be a discussion of whether there will be an effort
5 to extend discovery that we have to discuss before that
6 point.

7 THE COURT: Have you ever tried a case before
8 Judge Brinkema?

9 MR. CAFFAS: I have, yes.

10 THE COURT: Yes. If you know, she does not -- you
11 know, extending things are not sort of her favorite thing to
12 do.

13 MR. CAFFAS: I know. I understand that very much,
14 Your Honor.

15 THE COURT: So, it is -- you know, oftentimes, you
16 know, parties think, well, this happens in other districts,
17 or, you know -- and they're very surprised at the pace -- or
18 they are very surprised at the limited time that they're
19 given to do things. So just bear that in mind; all right?

20 MR. CAFFAS: Yes.

21 THE COURT: All right. Thank you, guys. Have a
22 great weekend.

23 MR. CAFFAS: Thank you, Your Honor.

24 (Proceedings adjourned at 11:55 a.m.)

25 I certify that the foregoing is a true and accurate

transcription of my stenographic notes.

Stephanie Austin

Stephanie M. Austin, RPR, CRR